Advance Transportation Company *and* Harry Bidwell *and* Charles Coleman *and* John Reed *and* Daniel A. Tuffs, Jr. Cases 13–CA–29721, 13–CA–29805, 13–CA–29879, 13–CA–30285, 13–CA–30302, and 13–CA–30412

March 31, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On June 24, 1992, Administrative Law Judge Harold Bernard Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order, as modified.[4]

In adopting the judge's finding that deferral to a decision by Arbitrator Herbert M. Berman regarding Charles Coleman's discharge is inappropriate, we find that the Board's standard for deferral has not been satisfied.

In *Olin Corp.*, 268 NLRB 573 (1984), the Board held that it would defer to an arbitrator's award where the proceedings before the arbitrator were fair and regular; all parties were bound; the arbitrator's decision was not clearly repugnant to the purposes and policies of the Act; and the arbitrator considered the unfair labor practice issue. The Board explained that it would find that the arbitrator had adequately considered the unfair labor practice if the contractual and unfair labor practice issues were factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.

Here the sole issue before the arbitrator was whether Coleman's alleged falsification of records and verbal exchange with Sharon Henzel, a J. C. Penney Company supervisor, on August 28, 1990, constituted just cause for discharge in accordance with the parties' collective-bargaining agreement. There is no evidence that the arbitrator was presented with or considered facts concerning Coleman's protected concerted activities, the Respondent's antiunion animus and its pattern of discriminatory conduct, and whether the Respondent's claimed basis was a pretext. Thus, the contractual unfair labor practice issues were not factually parallel. See *M & G Convoy*, 287 NLRB 1140 (1988). Therefore we do not defer to the award.

With further respect to the discharge of Coleman, we note that this matter was also ruled upon by Election Officer Holland and Independent Administrator Lacey. These officials were empowered to act as a result of a consent decree entered by the U.S. District Court for the Southern District of New York. (*U.S. v. Teamsters*, 88 Civ. 4486, Mar. 4, 1989). See also *U.S. v. Teamsters (Yellow Freight)*, 948 F.2d 98 (2d Cir. 1991). Respondent seeks deferral to decisions by these officials that the Coleman discharge was not unlawful under the consent decree. We do not pass on whether such nonarbitral decisions could provide the basis for deferral. Rather, assuming arguendo that they could do so, we note that Lacey, in affirming Holland, said that neither of them had ''addressed the merits of Coleman's NLRB action.'' In addition, we rely, as did the judge, on Respondent's ''marked proclivity to violate the Act.''[5]

With respect to the discharge of Tuffs, we note that this matter was processed as a grievance and was reduced to a suspension and then to a warning. The warning was considered by Election Officer Holland, and he ordered that it be removed. Holland's order was affirmed by Lacey. It is not clear whether the warning was in fact removed. In these circumstances, and again without passing on whether there could otherwise be deferral to such nonarbitral rulings, we agree with the judge that the Board should not defer.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We note that the judge did not find, as alleged in the complaint, that the Respondent violated Sec. 8(a)(4) by discharging employee Tuffs and converting his discharge into a suspension. The General Counsel did not except to the judge's failure to find this violation.

We find no merit to the Respondent's contention that the violation regarding the unlawful posting of no-solicitation rules was remedied pursuant to an order of the election officer. The election officer ordered the rules rewritten and reposted pursuant to the court-supervised election procedures. There is no evidence that the Respondent repudiated its unlawful conduct under the standard articulated in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

In adopting the judge's decision that the Respondent violated the Act by unlawfully issuing a warning letter to Tuffs on May 25, we also rely on its shifting explanation for the warning, which was for alleged ''harassment of supervision.'' At the hearing and in its exceptions, the Respondent has contended that Tuffs' conduct violated Federal and state driver safety regulations and has not relied on the alleged harassment.

[4] We shall modify the judge's recommended Order and substitute a new notice to employees to conform to our usual language for broad cease-and-desist orders.

[5] Member Raudabaugh does not rely on this factor.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Advance Transportation Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(l).

''(l) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue warning letters to employees because they oppose our profit-sharing plan or because of their support for any candidates in a union election.

WE WILL NOT order any employee to stop wearing buttons or other insignia opposing our profit-sharing plan.

WE WILL NOT threaten to call police if any employee continues to circulate a petition for a group employee grievance on our parking lot.

WE WILL NOT maintain or enforce any rule prohibiting an employee on nonworking time from distributing literature or buttons relating to protected activities in nonwork areas, or from soliciting their fellow employees during nonworking times to engage in such protected activities.

WE WILL NOT prohibit employees from such distribution if performed off our property or if on our property, such distribution is on the employees' nonworking time and in nonwork areas.

WE WILL NOT maintain or give effect to employee rules 6, 7, 11, and 12 as they existed after August 20, 1990, which prohibit our employees from engaging in protected activities. WE WILL NOT discriminatorily deny any employees use of the lunchroom because of their protected concerted and union activities.

WE WILL NOT confiscate or destroy literature or campaign materials, relating to employees' protected concerted and union activities, posted on company bulletin boards of general use.

WE WILL NOT warn, suspend, discharge, or otherwise discriminate against any of you because of your protected concerted and union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind letters of warning issued to employees Charles Coleman, Harry Bidwell, and Daniel Tuffs.

WE WILL rescind the discharge and suspension of Daniel Tuffs, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge and suspension, plus interest.

WE WILL offer Charles Coleman immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any interim earnings, plus interest.

WE WILL notify each of the employees named above that we have removed from our files any reference to the warnings, suspension, and discharge, and that the warnings, suspension, and discharge will not be used against them in any way.

ADVANCE TRANSPORTATION COMPANY

Jessica T. Willis, Esq., for the General Counsel.
John M. Loomis, Esq., of Chicago, Illinois, and *Leonard R. Kofkin, Esq.*, of Milwaukee, Wisconsin, for the Respondent.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD JR., Administrative Law Judge. I heard these cases on January 21–23, 1992, in Chicago, Illinois, pursuant to a consolidated complaint issued on September 27, 1991, based on charges filed respectively according to the above caption on September 19, October 29, December 20 and November 21, 1990, and on June 3 and August 2, 1991. The complaint alleges that Respondent unlawfully maintained and enforced a no-solicitation rule prohibiting employees from engaging in protected concerted and union activities, unlawfully interrogated employees concerning such activities, issued warnings and letters of reprimand to employees for engaging in protected concerted activities, discharged employee Charles Coleman, and suspended/discharged employee Daniel A. Tuffs Jr. thereby violating Section 8(a)(1), (3), and (4) of the Act. (G.C. Exh. 1cc.)

Based on the entire record[1] and my observation of the witnesses and after considering the briefs filed by counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

As admitted, I find that Respondent, an interstate trucking firm based in Bedford Park and Bloomington, Illinois, annually receives revenues in excess of $50,000 for transporting freight from its described locations directly to points outside Illinois, and that as an essential link in the transportation of such commodities in interstate commerce, is an employer within the meaning of the Act. Admittedly, the Highway Drivers, Dockmen, Spotters, Rampmen, Meat, Packing House and Allied Products Drivers and Helpers, Office Workers and Miscellaneous Employees, Local Union No. 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America AFL–CIO is a labor organization as defined in the Act.

II. THE UNFAIR LABOR PRACTICES

Prior Cases

In two prior cases Respondent was found to have violated Section 8(a)(1), (3), and (4) of the Act by discharging an employee, Harry Bidwell, because he engaged in the protected concerted activity of opposing Respondent's profit-sharing plan and other union activities and for filing charges or giving testimony under the Act; and by discharging employees, including Daniel A. Tuffs, Jr., for also opposing the profit-sharing plan. Respondent was further found therein to have unlawfully created the impression that employees' protected concerted activities were under surveillance, unlawfully threatened employees with discharge and loss of job advancement, and unlawfully issued instructions to an employee not to associate with other employees because of their protected concerted activities.[2]

The July 31, 1990 Drivers' Meeting

Respondent, already shown to harbor strong animus towards employees who voiced or otherwise expressed opposition to a profit-sharing plan instituted in April 1988 by discharging Bidwell and Tuffs, continued to manifest such animus immediately following a meeting held by management with its first shift city drivers at 8 a.m. on July 31, 1990. Scheduled as a safety meeting, Respondent's regional manager Thomas Horvath used the opportunity to speak to the assembled drivers about the plan, pursuant to which employees must give back 12 percent of their weekly earnings to the Company to buy equipment and make investments so as to hopefully enable Respondent to continue operating and also furnish employees biannual payments from profits.

Among assembled employees were Bidwell and Charles Coleman, who both actively opposed the plan by distributing literature, petitions, and by wearing and distributing to other employees buttons bearing the inscription ''Ban the 12%.'' They did so part and parcel with their allegiance to, and membership in the ''Eagle Slate,'' union members supporting a reformist group headed by opposition candidates in a recent Teamsters national election, Coleman like Bidwell, being particularly active in this regard, his briefcase also bearing the opposing candidates' stickers.

Horvath told employees that their checks in payment of plan proceeds would be bigger than previous ones setting off a series of remarks, catcalls in nature, but short of any hooting and hollering or rowdiness. At some point during the voiced responses by employees, Horvath recognized Coleman's request to speak, indicated by his hand being raised for permission to do so. Before Coleman could begin, another employee asked if the amount would be enough to take his wife out to dinner, and another driver, Lawrence Reilly, asked if he would be surprised by the amount. Coleman then said by the way of replying to Reilly that it wouldn't be as much as they had taken out of his paycheck. Freeze-framing matters at this point, it was easily foreseeable by Respondent representatives that the discussion was heading towards some heat yet Respondent, free to avoid disputatious discourse by ending the meeting, or changing the subject, chose freely to turn the meeting into a forum-like defense of the plan. Horvath, hot under the collar, said if it wasn't for the plan, the drivers would not be working. Coleman and Horvath then got into it, the former saying he didn't believe that, and the plan was just a band-aid on a larger problem such as, among other things, poor management—Coleman's latter comment being offered in response to Horvath's express question for Coleman to explain what Coleman meant by the band-aid reference. Respondent's terminal manager Tom Harper then asked Coleman what he meant by poor management, still further inviting the employee to speak his mind on the subject, Respondent again passing up another opportunity to end matters there. Coleman said there were a lot of management people not doing anything for the dollars employees paid into the plan, and that this plan was stealing from employees. Harper told Coleman to shut up, angry over Coleman's response to his question, whereupon employee Bidwell countered that it was still America, that Coleman had a right to his opinion and that's what Coleman was doing, voicing his opinion. Harper then ordered Coleman and Bidwell to his office, Horvath pointedly directing Coleman to bring his suitcase covered by opposition candidate Ron Carey stickers on both sides along with him. Dispatcher Richard Blake, Harper, and Director of Labor Relations William Close, along with Union Steward George Leicht were also present. Close told Coleman he had no business disrupting the meeting, and Coleman said he didn't think employees should be required to take part in the plan. Other comments were exchanged mutually critical and growing out of the opposition by Coleman and Bidwell to the plan until the meeting ended.

Warning Letters to Bidwell and Coleman

The very next day, August 1, Respondent issued letters of warning to both employees citing disruptive behavior by them towards Horvath at the general drivers meeting, and signed by Harper, neither of which Respondent representatives testified at the hearing contrary to the descriptive testimony of Coleman and Bidwell about events at the meeting. (G.C. Exhs. 15, 20.) The letters warned the two employees about further discipline, including discharge, for further simi-

[1] Respondent's unopposed motion to correct transcript errors is granted.

[2] 299 NLRB 900 (1990); and 300 NLRB 569 (1990).

lar conduct, but Respondent issued no such warnings to other employees in attendance at the meeting though some openly, jokingly, derided the plan.

There is no question that the two employees engaged in protected concerted and union activities openly and known to Respondent by voicing their opposition to the profit-sharing plan, and by supporting an opposition slate of candidates in the Union's election. *Advance Transportation Co. I* and *II* cited above; and *Office Employees*, 307 NLRB 264 (1992). Respondent's animus to both such forms of employee activity is established by the above-cited recent *Advance Transportation* decisions. The lack of a justifiable reason for issuing its warning letters to the employees is likewise evident. Coleman's right to express himself was warranted by his protection under the Act to voice disapproval of working conditions along with the other employees at the meeting in concert with them, as was Bidwell's to support Coleman in said regard and neither lost that protection by their conduct. It was Respondent's general manager and terminal manager who invited Coleman's opinions and Coleman's elaboration of same after Coleman had sought permission to speak in the generally acceptable manner of raising his hand. Having raised the subject, encouraged further discussion about it, and pursued it into heated disputes, it ill behooved Respondent to claim Coleman and Bidwell ''disrupted'' the meeting. I further find Respondent's reference to ''anarchy'' and ''disruption'' ill chosen to support the issuance of warnings to Bidwell and Coleman. Paralleling their rights under the Act they both had the right to question the profit-sharing plan's performance under Respondent's management since the two, and other employees occupied a shareholder-like status with a clear stake in the plan's performance since they helped finance it. Therefore, direction of comments to how the plan was performing was appropriate and to be expected. It is apparent that Respondent's explanation for its discipline of Coleman and Bidwell does not stand up to scrutiny, supporting the view that its conduct was discriminatory. *C-F Air Freight*, 247 NLRB 403 (1980). I find that contrary to Respondent's contentions it was the disfavored content of Coleman's and Bidwell's comments that motivated the warning letters issued to them, and not any unproven disruption. *Fairprene Industrial Products*, 292 NLRB 797, 804 (1989). Counsel for General Counsel having established a prima facie case, it was then the Respondent's burden to go forward with evidence showing it would have issued the warning letters apart from the employees' described protected activities and this it failed to do as it offered no evidence why the two were singled out for discipline and no others, and failed to present any convincing evidence why the employees' conduct warranted discipline or in any manner had lost the protection of the Act. Accordingly, I find that by issuing Coleman and Bidwell the warning letters Respondent violated Section 8(a)(1) and (3) of the Act. *Wright Line*, 251 NLRB 1083 (1980), enfd. as modified 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Coleman's Discharge

Soon after issuing the illegal warning letters, Respondent terminated employee Charles Coleman by letter dated September 6, 1990, citing as the reasons for this action that Coleman had falsified company records pertaining to a delivery and pickup at J. C. Penney on August 28, 1990, and while there was belligerent and insulting to a supervisor, Sharon Henzel, causing her to call Respondent and ask that Coleman not be allowed to return to J. C. Penney in the future. The dismissal letter added that Coleman's prior ''record'' in light of these incidents also warranted his immediate discharge. (G.C. Exh. 17.)

For the day in question, Coleman's timecard and delivery manifest, argues Respondent, proves that he falsified the time he worked because Coleman thereon claimed pay for a full day's work when, according to Respondent's information from J. C. Penney, it believed Coleman had finished work unloading at 1:15 p.m. and since, in addition he could not have been ''working'' while on the phone with Respondent's dispatcher and dispatch manager concerning a drawn-out problem over Coleman's lunchtime, location, and appropriateness, from 1:45 to 2:30 p.m. could not have been ''working'' then either. Respondent claimed Coleman had stolen this amount of time. Respondent's brief at 19–20.

Coleman had been delayed in leaving the terminal that morning through no fault of his own due to truck mechanical problems. He unloaded the truck at J. C. Penney and made several calls to Respondent's dispatcher about taking lunch, not getting through on several unsuccessful attempts, and after getting through, becoming involved in time consuming discussions over where to get lunch. He finally was given permission to take lunch but, aware that this could cause a delay in a pickup at J. C. Penney, decided to take a ''no-lunch'' and get the matter resolved later. Respondent does not allege the lunch-no-lunch issue as a basis for Coleman's discharge, relying on the alleged falsification of company records. The record shows, however, that the Respondent did not contest Coleman's testimony that he was on the dock at J. C. Penney premises during the period in question, and, in fact, Respondent relies on the work-related calls made by Coleman to Respondent from J. C. Penney to support its claim that Coleman ''falsified'' the timecard and driver report—because he couldn't have been ''working'' during such calls. Respondent failed to show that any of its drivers are docked for work-related calls or the time it takes to resolve problems arising therefrom during the normal work day, and there is uncontroverted testimony by driver-employee Bidwell that such work-related delays and resulting phone calls to Respondent while a driver is away from his truck is considered working time and not unpaid breaktime so it would be entirely appropriate under normal circumstances for Coleman not to have deducted from his timecard the time consumed by the work-related phone calls. Moreover, Respondent's claim that Coleman finished on-hands work unloading at 1:15 p.m. is based on a notation on the manifest of J. C. Penney to such effect. Witness J. C. Penney Dock Supervisor Robert Smith testified that this merely showed the time the last merchandise was unloaded and not other time the driver needed to unload the conveyor, close the doors, and pull out. (R. Br. at 47.) The amount of time in issue becomes even less. For Respondent to therefore exaggeratingly and erroneously use a seemingly innocent and commonplace practice wherein employees are not docked for work- and delivery-related duty time as grounds for branding Coleman's recordkeeping as a theft of time, belies its claim that it would have fired Coleman for such unsuspicious conduct

even without regard for his protected concerted and union activities.

While taking a break in his truck cab, Coleman thereby made J. C. Penney loading employees delay working which led to an encounter with J. C. Penney Supervisor Sharon Henzel whose testimony as a witness called by Respondent is straightforward, thoughtful, unbiased, and wholly credible. Henzel attempted to determine from Coleman why the driver was taking a break at a time inappropriate to the J. C. Penney employees and a minor tiff between the two ensued, Coleman explaining he was on break and manifesting in Henzel's understandable view an undesirable attitude.

Henzel's account has it that when she approached Coleman who was in the cab she said something like is there a problem or do we have a problem here, and that Coleman said he was tired and he had worked without a break and lunch and he was having a break asking then if Henzel had a problem with that. Henzel replied no but that usually breaks are not taken in the middle of a shipment causing other employees to stand around; and by the same token she told Coleman we try not to take breaks which cause drivers to wait. Coleman told Henzel his break was almost over now, and she said she'd have to call Advance asking for Coleman's name and Coleman replied to you—Mr. Charles Coleman. She then identified herself. Henzel recalls Coleman said he didn't care what Henzel did there, what Penney does, that he didn't ask for her name, and he was taking his break and you do whatever you have to do.

Henzel called Respondent's office and reported Coleman's behavior both in Coleman's timing of his break and a grumpiness or belligerent-like attitude. While a simple written apology by Respondent could well have resolved matters of concern by Respondent over its relationship with a major company customer, and discipline of Coleman calculated to prevent any recurrence of such conduct by him, Respondent instead launched a major investigation into the matter and chose to terminate Coleman partially over the incident. I find that the rather extraordinary investigation into an incident blown way out of proportion—after all, encounters on the loading dock between supervisors and truckdrivers are not reasonably to be expected to be governed by polite rules of gentility, there were in fact prior such encounters at J.C Penney by driver Bidwell and Coleman used no vulgarity, profanity, intentionally insulting words, and made no threats—again reveals an animus-driven decision against Coleman. It is highly significant that in its discharge letter to Coleman Respondent made the express representation that his conduct caused ''the manager [Henzel] to call Advance and ask *that you not be allowed to return to J. C. Penney*.'' (G.C. Exh. 17.) p.2 (Emphasis added.) But when called to testify by Respondent, Henzel testified, ''I want you to know that it came up later that somebody had felt that I had asked for this driver [Coleman] never to come back. I would never do that everybody has bad days.'' During her turn at the witness, counsel for General Counsel confirmed Henzel's account: Q. ''It was not your suggestion this driver [Coleman] not be sent back?'' A. ''No.'' Respondent's false claim appears to be an animus-driven effort to buttress the alleged cause for discharging Coleman into something stronger than the reported facts which belies any assertion of a purely nondiscriminatory motive for its action. Lastly, Respondent made no effort at trial or on brief to identify the ''prior record'' of Coleman which it asserts as a still further basis for the discharge. The record shows that Coleman's ''prior record'' with Respondent contains the results of grievances resulting in favor of the employee. Respondent can therefore rely neither on an undescribed ''prior record'' or the conduct therein nor Coleman's protected activity utilizing the grievance machinery in the agreement between Respondent and the Union, as a basis for penalizing Coleman by discharge.

There being a prima facie case made out by counsel for General Counsel that Respondent discriminatorily discharged Coleman and Respondent having failed to establish that it would have discharged Coleman aside from his protected and union activities inasmuch as it asserted reasons, do not withstand scrutiny but are pretextual and without justification. I find that Respondent, by discharging him because of his protected concerted and union activities, violated Section 8(a)(1) and (3) of the Act. *Wright Line*, supra.; *Limestone Apparel Corp*., 255 NLRB 722 (1981); *Office Employees*, supra. (Employee's language though vulgar and offensive—far more than Coleman's—was held not so extreme as to render the individual unfit for further service.)

Alleged Interrogation of Charles Coleman on September 6

Counsel for General Counsel contends in complaint paragraph 5k that Respondent's director of labor William Close just moments before the meeting on September 6 when Respondent discharged Coleman, called Coleman into his office where he questioned Coleman, asking if the employee had decided to stop his campaigning and the wearing of the ''buttons,'' and that this constitutes unlawful interrogation in violation of Section 8(a)(1) of the Act. It was her burden to prove by a preponderance in the evidence that this occurred and was such a violation. To this end Coleman testified to the above occurring and that in response he told Close no, Coleman believing it should have been obvious since he had the buttons on and had his briefcase with him but answering no anyway. Coleman then asked if there were anymore questions and when told no left Close's office and returned downstairs where he later received word from Union Steward John Molenda that Close wanted to see them, in Regional Manager Horvath's office, this being a summons to a meeting where Respondent informed Coleman he was being discharged. Close flatly denied any private meeting alone with Coleman anytime that day. Coleman had testified that on arrival at 8 a.m., he was told by dispatcher Ray Litza that Close wanted to see him in his office that morning and Litza's testimony on this point might have been helpful on the issue, but though he testified, he was not asked about this. Counsel for General Counsel tried to support the view that Coleman should be credited over Close because a reliable employee and a company witness placed the time of the meeting in Horvath's office as 8:15 or 8:20 over others' accounts that the meeting began at 8 a.m. thereby precluding the Coleman-Close private meeting at the same time from having occurred. While persuasive on that point, namely the time the meeting started—8:15 or 8:20 a.m., this only made it possible for the alleged earlier Close-Coleman discussion in Close's office to have occurred—it did not go very far in proving by a fair preponderance in the evidence that it had occurred. In this connection, the record was not fortified with any objective basis for discounting either Coleman's or

Close's testimony on a credibility basis. Furthermore, the record did not provide any plausible basis why moments before a well planned and investigated-beforehand such meeting, Close would go into a one-on-one with Coleman at all, especially since it was obvious Coleman was continuing the allegedly questioned activity in the open with the buttons and other insignia on his briefcase. Further, Close knew that Coleman knew about his longstanding opposition to what Coleman was doing and that it, Close's continuing opposition to such activity, had had no effect on dissuading Coleman from continuing on such course so there was no purpose whatsoever in trying to dissuade Coleman then, just moments before Close believed he was going to be rid of the activist employee by discharging him. For these reasons this allegation in the complaint was left unproven by any fair preponderance in the evidence and will accordingly be dismissed.

Respondent's Rules Against Solicitation

Respondent notified employees at Bedford Park on August 21, and Bloomington on December 13, 1990, in written posted rules that employees were prohibited from, inter alia: (1) not departing from the company premises, including the parking lot, promptly after punching out; (2) discussing company affairs, activities, personnel, or any phase in operations with unauthorized persons; (3) posting or circulation of unauthorized notices, posters, or handbills on company premises, or distribution or circulation of written or printed matter in any area of the terminal or its premises; and (4) harassment, intimidation, distraction, or disruption of another employee. (Rules 6, 7, 11, and 12 set forth in Respondent's notice G.C. Exh. 2.)

There can be little doubting that Respondent's rules posting was targeted at the employees' union election activities then underway. Respondent showed the importance it placed on the survival of its profit-sharing plan , an election campaign connected issue when it told assembled employees they wouldn't be working but for the plan. It was no secret that the election contest could well mean the plan's demise if the incumbents in union office were unseated by the efforts of those actively campaigning for the new Carey-led slate, those who, also, wore antiplan buttons and were targeted by Respondent with unlawful warnings in their file and discharge from employment because of their conduct in opposition to incumbent union officers and the officers Respondent supported profit-sharing plan. Thus the rules' publication arises in the well supported context of employee exercise of protected and union activities described clearly in the record. *Advance Transportation I* and *II* cited above, and *Office Employees*, supra. Evaluation of such rules, therefore is guided by long settled Board precedent which sets limits on how far an employer can go to prohibit employee freedom to engage in these activities.

Under this guidance Respondent's rules are unlawful on their face, rule 1 because unjustified by business reasons Respondent thereby denies off duty employees entry to parking lots, gates, and other outside nonworking areas; rule 3 because it, likewise without business-related reasons overly broad bans printed or written literature in any area of Respondent's premises from being posted or distributed; rule 2 because it fails to define the area of permissible employee conduct thus it is calculated to cause employees to refrain from engaging in any protected activities; and rule 4, as further noted by counsel for General Counsel on brief, because it is vague and ambiguous and so overly broad as to fail to define permissible conduct thereby fortifying Respondent with power to define its terms and inhibit employees in exercising rights under Section 7 of the Act. See, respectively, *Tri-County Medical Center*, 222 NLRB 1089 (1976); *Elston Electronics Corp*., 292 NLRB 510, 528 (1989); *Cincinnati Suburban Press*, 289 NLRB 966 (1988); and *National Steel Corp*., 236 NLRB 1033 (1978).

Bidwell's Warning Letter

Respondent was found earlier to have discharged driver Bidwell for, inter alia, engaging in ''the protected concerted and union activities of attempting to induce his fellow employees to petition and vote against [the profit sharing plan] . . . and [of] running for union office on a slate which opposed the [plan].'' *Advance Transportation Co*., supra. Judge Sherman's decision finding this issued April 20, 1990. Yet without flinching, Respondent's director of labor, on August 29, 1990, told Bidwell Respondent would not allow him to wear a button seeking to ban the 12 percent referring to the profit-sharing plan compulsory deduction from employee pay off the company premises. The button in question, shown in General Counsel's Exhibit 3, bears only the inscription ''12%'' with a line crossing out the numeral 12 percent, and nothing further. Thus, there is no reference to Respondent's name or the union name, and Respondent offered no convincing argument why the wearing of this button posed any reasonable threat to its business then or expectably in the future if worn by its employees off its premises. Its alleged concern that customers might fear for their cargoes' safety if they saw such insignia is too remote, speculative, and undemonstrated to outweigh employee rights to engage in such conduct. Bidwell continued to wear the button and received a written warning on September 7, 1990. (G.C. Exh. 21.) Bidwell's open opposition to the profit-sharing plan has earlier in this decision and Judge Sherman's, already been demonstrated to be an integral part of his protected intraunion activities as well as protected concerted activities which motivated Respondent's discriminatorily discharging him, and on August 1, 1990, issuing a warning letter against him. (G.C. Exh. 20.) Its described September 7, 1990 warning letter against him is but a continuation in Respondent's unlawful conduct and a further violation, in such context, of Section 8(a)(1) and (3) of the Act.

Respondent's Further Enforcement of Solicitation Rules

The record amply supports allegations in the complaint that Respondent enforced its invalid no-solicitation rules. On or about August 1990 and shortly thereafter, Close told employee Coleman that employees were not to wear the button reflecting opposition to the profit-sharing plan and that he would no longer be allowed to distribute the buttons or campaign on company premises in the Teamsters International election. Close told him he would be subject to discipline if he didn't comply. Around August 23, 1990, Close also directed employee Daniel Tuffs not to wear the button in front of customers on pain of discipline or to distribute them to fellow employees. On November 6, Close angrily refused to grant permission to Tuffs and fellow employee Albert Brown to either circulate a list of contract proposals among employ-

ees on a signature petition for opposition candidate Ron Carey among employees. On November 14, and again on November 28, Respondent through Terminal Manager Tom Harper denied Tuffs permission to circulate election literature during nonworktime in nonwork areas under the threat of discipline if he did so.

Respondent's unlawful curb on Tuffs is further highlighted on April 17, 1991, when Dock Supervisor Bob Michaels threatened to call the police when he discovered Tuffs in the company parking lot soliciting employee signatures on a group grievance, after Tuffs had completed his shift, unless Tuffs stopped doing so, although other employees were allowed to congregate there before and after work to sell raffle tickets, work on their cars, or sell their school children's candy. On May 3, 1991, Respondent's terminal manager Harper removed and trashed fliers about a forthcoming contract notification vote Tuffs had posted in the drivers lunch room during nonworking time on an all-purpose bulletin board.

Tuffs' Warning Letters

Respondent issued Tuffs a warning letter on May 25, 1991, referring to ''many'' unidentified acts of insubordination and harassment of supervision by him in the past which could no longer be condoned by Tuffs' behavior on May 15, 1991, when, the letter alleged, Tuffs had mimicked the actions of a monkey or chimpanzee while waving to Supervisor Sol Frelix from the cab of Tuffs' truck, General Counsel's Exhibit 4, and concluded he had been engaged in harassment and insubordination. While Frelix testified he interpreted the gesture as a racially based degrading insult by Tuffs and alleged there had been many other confrontations with him, he offered no such examples, and while there was little basis to question Frelix's resentment, the record contained no reasonably objective basis for concluding that Tuffs intended to insult or ridicule his supervisor since the testimony—described gestures by Tuffs do not admit of more than enthusiastic, albeit horseplay-like and non-too safe conduct since the truck was in motion. There is moreover, no evidence that Respondent considered, investigated, or interviewed Tuffs for his version, which Tuffs had supplied by way of explanation, so as to get to the truth. Such an omission justifies the view that Respondent harbored a discriminatory motive when it took this action. *Impact Industries*, 285 NLRB 5 (1987); and *Delta Gas*, 282 NLRB 1315 (1987). I note further that Supervisor Frelix effectively handled the situation promptly after the incident admonishing Tuffs before other employee witnesses, sternly. Based on these circumstances and counsel for General Counsel's fully demonstrated prima facie case, it was Respondent's burden to show it would have issued the warning letter even without regard to Tuffs' described protected and concerted activities and this it failed to do, so that under the above-cited authority in *Wright Line* it is found that Respondent further violated Section 8(a)(1) and (3) of the Act.

By letter of June 5, 1991, Respondent accused Tuffs of mishandling freight, alleging he had incorrectly delivered one crate to a customer although marked for another and branding him guilty of carelessness causing inconvenience to the two customers and expense to Respondent in a delivery on May 28, 1991. (G.C. Exh. 5.) Tuffs unrebutted testimony shows his truck was already loaded and ready to go on the day in question, that he was given bills and dispatched; that he delivered some 10 combined skids from different vendors to Usco Distribution Services—the skids were unloaded by forklift, Tuffs noticing that there were labels on the freight and counting the pieces without noticing any labels addressed incorrectly. The count of pieces matched up with the manifest—Tuffs checking the shipper name and the pieces. The receiving supervisor at Usco, according to Tuffs, sees to it that all the pieces are delivered and that the two agree on this. Tuffs stated he had no shorts or overages on the delivery in question that week, that he made a proper delivery. No testimony by Respondent to rebut Tuffs' account was offered but counsel for General Counsel neither questioned the factual account in the letter nor the allegation therein that it was Tuffs duty as driver to ''carefully count and check your freight against your freight bill at the time of delivery so that costly errors such as this would not occur.'' (G.C. Exh. 5.) It is apparent that in the normal course of its business, if Respondent delivers freight to the wrong address it is due to oversight on Respondent's personnel or employees but it is not so apparent that in all cases it is the driver's fault or Tuffs' alone in this case. Respondent called its city dispatch manager Richard Blake to the stand to testify on other matters, but, though Blake signed the warning letter to Tuffs, he was not asked why Tuffs was necessarily to blame, or whether he had checked with the Usco supervisor who checked in Tuffs' load to see why or whether that official had missed the errant freight. Nor did Blake testify whether he had sought Tuffs' version of the event *before* deciding it was all his fault due to negligence—instead Respondent disciplined Tuffs within a few days. On balance, and given Respondent's earlier reported discrimination against Tuffs, including a further finding below that it unlawfully discharged him, I conclude a prima facie case is made out given that Respondent with blinders on as to Tuffs' version of events, betrayed a discriminatory motive when it issued the warning letter. With no proof such as its practice in such cases or other employee like warnings offered that Respondent would have done so even apart from Tuffs' protected concerted and union activities, I find it established that Respondent's conduct again violated Section 8(a)(1) and (3) of the Act. *Impact Industries*, supra; and *Delta Gas*, supra.

Respondent did not stop there. On July 19, 1991, Tuffs' dispatcher told him that drivers couldn't take any more breaks at the terminal in the driver lunch room used generally by all other personnel and employees on the transparently pretextual basis that it deprived dockmen the opportunity to do so. Equipped with six or seven 8-foot tables able to accommodate 40 to 60 persons, the room was not shown by Respondent to be suddenly unable to handle Tuffs or other drivers as usual, rather, the only reason appears to be based on Tuffs' using the area to post the above-described literature. On July 29, Respondent's action was overruled by an election official and Tuffs resumed his practice of posting such material. (G.C. Exh. 7.)

Attempting to go on break on August 2, 1991, in the general lunch room after dropping off his empty trailer at the terminal, Tuffs, carrying campaign materials, told Dispatch Manager Richard Blake he intended to take a break in the lunchroom. Blake said no, a customer (Public) was waiting for him and to go now with a load and take his break on the way. Blake did not tell Tuffs about the specifics of any

need for the instant dispatch and the bills for the trip did not indicate, as is the practice, any need for an immediate run or that it was a ''hot'' load. Tuffs told Blake he wanted to replace a torn down Carey poster and distribute campaign related literature and assumed Blake was ignoring the recent ruling, described above, by which Tuffs was reauthorized to use the lunch room for breaks and to campaign there. Tuffs was then told by a nearby union steward to go ahead and go—telling Tuffs he didn't know anything about the ruling. Tuffs then complied, hooking up the trailer for the bills he got in the dispatch, did his pretrip check, and found nothing wrong. He then, on the way out, parked in front of the building reserved for such purpose, entered the drivers room, and posted a Carey poster whereupon Blake appeared asking what he was doing and whether he was refusing to work. Tuffs explained to Blake he was all hooked up and ready to go, that he was going to take his break and after doing so deliver the load. The two exchanged the same communication once again whereupon Blake told him he was fired. Enroute outside, the two encountered Harper who was told by Blake what had happened whereupon Tuffs again said he wasn't refusing to work but merely wanted to take his break there and not on the street. Harper told Tuffs he was terminated and to leave the property immediately. Tuffs filed a grievance over the matter and the discharge was reduced to a 1-day suspension—Respondent paying Tuffs 1 day ''sick leave'' pay for the day. For all that Tuffs knew or could reasonably understand that day, given the ongoing serious prior unlawful discrimination against him, Blake's orders that day were designed to continue Respondent's interference with his rights under the Act, and further, to defy the recent election officer decision by which Respondent's refusal to allow drivers to use the lunch room, was expressly set aside. Even more significantly by telling Tuffs he should take his break ''on the way'' Blake was thereby indicating that any immediate haste to get to the customer was not really the impelling motive behind his order that Tuffs not take his break in the lunch room, for a break on the way or in the lunch room would alike consume the same amount of time and delay in the shipment. This leaves two conclusions: the first being that Tuffs' conduct as reasonably known by management arose not from any stubborn insubordination but from the honest and justifiable impression that Blake was violating the recent order, and the second, that Respondent's true concern was to deny Tuffs the opportunity to post and distribute campaign literature in the lunch room rather than making an immediate delivery. Under *Wright Line* authority set forth above, including a prima facie case by counsel for General Counsel, and the failure of Respondent to show that it would have discharged him even aside from unlawful considerations, I conclude Respondent further violated Section 8(a)(1) and (3) of the Act by discharging Tuffs. Given some indication is in the record that Tuffs received a ''sick day'' it is better to provide a standard Board remedy to secure Tuffs' rights under the Act, including the need to erase the discharge/suspension from his record.

Deferral

Respondent filed a motion to defer these matters with the Board on July 25, 1991, contending that a decision by a private arbitrator warranted deferral in the matter regarding Coleman's discharge. At this hearing, Respondent added to the basis it alleged for deferral by the Board earlier, the decisions of a court-provided election official and an election administrator concerning Coleman's discharge as well as the discharge of Tuffs. (G.C. Exh. 1(ff), T–13–32.) The Board denied Respondent's motion on August 16, 1991. (G.C. Exh. 1(bb).) I find it would be particularly inappropriate to defer, as well, to the election officials' decisions, arising as they did, in the context merely whether election activity had led to the discipline of Coleman and Tuffs and admittedly without finding whether the employee conduct constituted protected concerted and union activity under the Act. Further, this is the third decision in a row wherein Respondent has been shown to demonstrate a marked proclivity to violate the Act by intensively targeting employee exercise of protected concerted activities with intimidation, discipline, discharge, warnings, and here unlawfully broad no-solicitation rules within *and* outside its premises. Without flinching after prior Board decisions against it, Respondent continued on its course of illegal conduct, and there is therefore a need to assure employees the protection of the statute they have been shown to need so clearly as the temporary election problem resolution procedure relied on by Respondent's argument does not guarantee employees the protection of their rights under the Act after that procedure expires postelection. To grant Respondent's sought after deferral would deny or water down employee rights under the Act severely by effectively denying them Board processes and remedies simply because a particularly hotly disputed election to determine the employees' bargaining representative officers was underway—in short, just when the Act's role in ensuring employee rights and stability in labor relations was most needed. The motion is denied as deferra would not effectuate the policies of the Act. *Spielberg Mfg. Co*., 112 NLRB 1080 (1950); *Olin Corp*., 268 NLRB 573 (1984).

The activities of Respondent set forth above, occurring in connection with Respondent's operations described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall recommend that Respondent offer Coleman and Tuffs immediate and full reinstatement to their former positions or, if those positions no longer exists, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss that they may have suffered as a result of Respondent's discrimination against them. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and interest shall be added thereto, to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Advance Transportation Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing warning letters to employees because they have engaged in protected concerted and union activities.

(b) Maintaining, giving effect to, enforcing, or applying any rule prohibiting its employees, when they are on nonworking time, from distributing handbills, leaflets, or similar literature relating to concerted activities protected by the National Labor Relations Act, in nonwork areas of Respondent's property.

(c) Prohibiting its employees, during nonworking time, from soliciting their fellow employees to engage in activities protected by the National Labor Relations Act.

(d) Maintaining, enforcing, or giving effect to rules 6, 7, 11, and 12, as they existed on and after August 20, 1990, or any other rules or policies thereafter promulgated, maintained, or enforced, which prohibit its employees from engaging in the conduct hereinabove described in paragraphs (a) and (b).

(e) Disparately enforcing any rule, practice, or policy which prohibits its employees from soliciting or distributing leaflets or other literature where an effect thereof is interference with conduct described hereinabove in paragraphs (a) and (b).

(f) Prohibiting its employees from distributing leaflets or other literature relating to their wages, hours, working conditions, or other terms and conditions of employment if performed off Respondent's property or, if on Respondent's property, if such distribution is on the employees' nonworktime and nonwork areas.

(g) Ordering employees to cease wearing buttons or other insignia in opposition to Respondent's profit-sharing plan.

(h) Threatening employees that Respondent will call the police unless employees cease destruction of a petition containing an employees group grievance on the company parking lot.

(i) Denying permission to employees to distribute buttons on election campaign materials at any time anywhere on the company premises.

(j) Confiscating and destroying employee contract ratification materials posted on the all pay company bulletin board.

(k) Discharging, suspending, issuing a warning letter to, or prohibiting any employee from using the employee lunch room, or otherwise discriminating against any employee because of the employee's protected concerted and union activities.

(l) In any manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind employee rules 6, 7, 11, and 12 found to be unlawful on their face and published on August 21 and December 13, 1990, and inform employees such rules will not be enforced.

(b) Remove from its files the warning letter issued to Coleman, Bidwell, and Tuffs and notify them in writing that this has been done and that nothing contained in the letter shall be used against them.

(c) Rescind the suspension of Tuffs and remove from its files any reference thereto and notify him when this has been done and that evidence of such action will not be used against him in the future.

(d) Offer Charles Coleman and Daniel A. Tuffs, Jr., immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as result of the discrimination against them in the manner set forth in the remedy section of the decision.

(e) Remove from its files any reference to the unlawful discharges of Coleman and Tuffs, and notify them in writing that this has been done and that the discharge will not be used against them in any way.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facilities in Bedford Park, and Bloomington, Illinois, copies of the attached notice marked ''Appendix.''[4] copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''